No. 11,238

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ZEREFA MALOOF,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

(Or, If a Rehearing Be Denied, For a Stay of Mandate.)

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Table of Authorities Cited

	Pages
Albrecht v. United States, 272 U. S. 1, 71 L. ed. 505	5
Asgill v. United States, 60 Fed. (2d) 780	2, 5
Ex parte Bain, 121 U. S. 1, 30 L. ed. 849	5
Fink v. United States, 142 Fed. (2d) 443	2
Flannagan v. United States, 145 Fed. (2d) 740	4
Morgan v. United States, 149 Fed. (2d) 185	2
Post v. United States, 161 U. S. 583, 40 L. ed. 505	5
United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588	2
United States v. Fried, 149 Fed. (2d) 1011	3
United States v. Hess, 124 U. S. 483, 31 L. ed. 516	2
United States v. Pepper Bros., 142 Fed. (2d) 340	3
United States v. Steiner, 152 Fed. (2d) 484	3
Yakus v. United States, 321 U. S. 414, 64 S. Ct. 660	4

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To the Honorable Judges of the United States Circuit Court of Appeals of the Ninth Circuit:

Appellant respectfully petitions for a rehearing of this cause after reaffirmance of the original opinion on the ground that the decisions cited in the opinion of this Honorable Court on rehearing do not sustain the conclusion that the information recited sufficient facts to properly charge a crime against the United States and to adequately inform petitioner of what she was charged.

The main distinction between the cases relied on by this Court, with few exceptions, and the case at bar is as follows: An information couched in language

such as the one under discussion is sufficient where there is a law or regulation specifically fixing the ceiling price and of which the Court can take judicial notice; but where there is no such law or regulation then the information must descend to particulars and set forth the facts which fix and determine the ceiling price.

In *Morgan v. United States,* 149 Fed. (2d) 185, the commodity involved was ice, for which the maximum price was fixed by regulation of which the Court could take judicial notice.

In the case at bar the general regulations for hotels and rooming houses provide several formulae for arriving at different maximum prices at which the same rooms can be rented. **The regulation made no specific price ceiling,** and in the information all the administrative symbols constituting the formulae are unknown quantities. There is nothing in the information to show how the pleader arrived at the ceiling price for this particular defendant. No court reading such an information could determine whether a crime has been committed.

See

United States v. Cruikshank, 92 U. S. 542, 23 L. ed. 588, 593;

United States v. Hess, 124 U. S. 483, 31 L. ed. 516;

Asgill v. United States, 60 Fed. (2d) 780, 784.

In *Fink v. United States,* 142 Fed. (2d) 443, decided by this Court, the information is not set forth,

nor is its sufficiency discussed. We fully discussed and distinguished this case in our Supplemental Brief.

The foregoing observations are likewise applicable to *United States v. Steiner,* 152 Fed. (2d) 484. The allegations of the various counts in the indictment are not quoted in the opinion, but the Court says:

> "The indictments clearly advise the defendants of the date of the sale, the person to whom sold, the place where the sale took place, the amount for which each implement was sold and the maximum or ceiling price for such implement under the above law and regulation."

It also appears that the sale involved was of agricultural instruments which were described in the indictment. **The price of these instruments was fixed by a certain maximum price regulation of which the Court could take judicial notice.**

As pointed out in appellant's Supplemental Brief, pages 10-12, *United States v. Fried,* 149 Fed. (2d) 1011, is wholly inapplicable. The information in that case was indisputably bad, and **was admitted by the Circuit Court of Appeals for the Second Circuit to be bad,** because it stated nothing but conclusions. The judgment of conviction was affirmed because of the peculiar rules of law and procedure prevailing on that Circuit, and the opinion admits that it is contrary to the decisions on other circuits.

United States v. Pepper Bros., 142 Fed. (2d) 340, is not at all in point. The chief question involved in

that case was whether a regulation adopted under the Emergency Price Control Act, fixing the price of Poultry in accordance with standards, was repealed by the Taft Amendment providing that the Act should not be construed as authorizing standardization or price regulation by classes or types, except under certain conditions. The District Court held the information insufficient, but the Circuit Court of Appeals reversed the ruling, proceeding apparently on the ground that the defendant had the right to attack the validity of the regulation, but that the District Court must accept the regulation as valid, unless and until it was set aside by the Emergency Court of Appeals or by the Supreme Court of the United States. The ruling of the Circuit Court of Appeals is obviously based upon a misconstruction of the opinion of the Supreme Court of the United States in *Yakus v. United States,* 321 U. S. 414, 64 S. Ct. 660.

Flannagan v. United States, 145 Fed. (2d) 740, involved a sale of beef for a sum in excess of the maximum fixed by the regulation. **The regulation specifically fixed the price per pound for a certain grade of beef,** and the information alleged that the beef sold was of that grade and of a certain designated weight. The name of the person to whom the beef was sold was given and the maximum price regulation was referred to. Accordingly, the information was in all probability sufficiently specific.

Lastly, it is submitted that without a valid information from which the Court can determine whether a crime has been committed and which sufficiently in-

forms the defendant of the nature and cause of the accusation against him, the Court has no jurisdiction to proceed to trial, and no failure to demur or to object to the sufficiency of the indictment can cure the defect, because the rule is elementary that jurisdiction cannot be conferred by inaction, waiver, or even by express stipulation. The failure of the indictment or information to charge a crime may be raised for the first time on appeal.

Asgill v. United States, supra;
Ex parte Bain, 121 U. S. 1, 30 L. ed. 849;
Post v. United States, 161 U. S. 583, 40 L. ed. 505;
Albrecht v. United States, 272 U. S. 1, 71 L. ed. 505.

It is respectfully submitted that a rehearing should be granted and the judgment reversed.

In the event of a denial of this petititon, appellant respectfully prays for a stay of the mandate of this Court to enable appellant to apply to the Supreme Court of the United States for a writ of certiorari.

Dated, San Francisco, California,
February 17, 1947.

Leo R. Friedman,
Attorney for Appellant and Petitioner.

Certificate of Counsel.

I hereby certify that I am counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
February 17, 1947.

Leo R. Friedman,
Counsel for Appellant and Petitioner.